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THE WISCONSIN GERRYMANDERS OF 1891 AND 1892

A CHAPTER IN STATE CONSTITUTIONAL HISTORY

BY

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On the eleventh of November, 1891, the Board of Supervisors of Adams county in the State of Wisconsin instructed the District Attorney of that county to institute proceedings in the courts of the State to the end that judgment might be rendered, declaring null and void the act of the legislature of 1891 which apportioned the State into senatorial and assembly districts, on the ground that this apportionment invaded the rights of the people by depriving them of equal representation in the legislative branch of the government, that it aimed to substitute the will of the minority for that of the majority, and that its provisions were unconstitutional and, therefore, directly subversive of representative government. The population of the State having been ascertained by the federal enumeration of 1890, as required by the State Constitution,[1] it became the duty of the legislature to apportion and to redistrict the members of the Senate and Assembly according to the number of inhabitants, excluding soldiers and officers of the United States army and navy, and Indians not taxed.

It was claimed that this apportionment should divide the inhabitants of the State in groups, or districts, as nearly equal as practicable; that the assembly districts should be bounded by county, precinct, town, or ward lines, and that

[1] Art. 4, Sec. 3.

both assembly and senatorial districts should consist of compact territory—the object of the constitutional provision for apportionment being to secure a practical re-arrangement and re-adjustment of the assembly and senatorial districts with reference to changes in the number of inhabitants from time to time, and as far as possible to maintain equality of political power and rights between the inhabitants of these various political subdivisions.

In forming these districts, local interests unified by the acquaintance and associations of their inhabitants were to be conserved as far as practicable. By the census of 1890 it appeared that the total population of the State was one million six hundred and eighty-six thousand (1,686,000). The State Constitution limited the number of assembly districts to one hundred, and the number of senatorial districts to thirty-three. This limitation of the membership of the two houses, therefore, fixed the units of representation at sixteen thousand eight hundred and sixty-eight inhabitants in an assembly district, and at fifty-one thousand one hundred and seventeen in a senatorial.

The act of Assembly of 1891 violated these constitutional provisions and duties, as was shown in its apportionment of representation. Not only was the unit of representation exceeded in many districts and diminished in others, but the assembly district in many cases was made to consist of counties not forming a compact territory, and to include towns outside of these counties. One district was one hundred and three miles in length. In one instance between two assembly districts there was a difference in population of thirty thousand three hundred and twenty-five inhabit-

ants. Other variations were flagrant. In one case there was an excess, over the unit of representation, of fourteen thousand seven hundred and ninety-nine persons; of sixteen thousand nine hundred and seventy-five persons in another; and of twenty-one thousand nine hundred and thirty-three in a third; while in others the population fell below the unit to the number of five thousand seven hundred and forty-nine in one, to twelve thousand six hundred and seventy-six in a second, and to thirteen thousand three hundred and fifty in a third.

The apportionment also changed the senatorial districts throughout the State so as to prevent large numbers of electors, who had participated in the election of State senators in 1888, from participating in the election of senators in 1894; while it permitted other electors, who had participated in the election of State senators in 1890, to participate again in such an election in 1892. The effect of this rearrangement of the senatorial districts was to disfranchise one-fifth of the total population of the Commonwealth.

In order to prevent an election under the act of 1891, the supervisors of Adams county sought to enjoin the Secretary of State from issuing writs for the next general election on the eighth of November, 1892, when members of Assembly, and State senators from the even numbered senatorial districts, would be elected in accordance with the terms of the act. Unless restrained by an injunction, issued by the Supreme Court of the State, the Secretary would issue the writs; in which event it was declared that the electors of Adams county and its inhabitants and the inhabitants of the State would be greatly injured in their political powers,

rights, and liberties as granted them by the Constitution. In order that the case might be heard and determined without delay, the Adams county supervisors presented their petition for the injunction in the Supreme Court of the State and averred the invalidity of the act of apportionment of 1891. The District Attorney of Adams county, therefore, became the petitioner, for the supervisors, to the court, praying leave to bring action there in the name of the State, on the declaration of the Attorney-General of the State or in the name of the county of Adams, or of its District Attorney, or otherwise as the court might direct, to restrain the Secretary of State perpetually from making, publishing, and delivering the notices of election of members of the Senate and Assembly as directed by the objectionable law.

The Attorney-General, upon this relation of Adams county and of its District Attorney, with the consent of the Supreme Court, came before its justices at the capitol, in the city of Madison, in the name of the State and showed that, under the practice of the court and the laws of the State, persons and corporations having grievances and claiming the exercise of the prerogative powers of the court to secure their rights, could be heard in the court only through the office of the Attorney-General of the State or through other parties by the consent of the court. The Attorney-General was unwilling that any parties claiming an injury to their rights, remediable by a judgment of the court, should be denied the use of his official name, as the law officer of the State, simply because that officer might not fully be convinced of the just claim of the party to be relieved; therefore, without assenting or dissenting as to the

truth of the allegations of the complaint he brought the question of the constitutionality of the act before the court. Thus the State of Wisconsin became the plaintiff and the Secretary of State became the defendant in the case, and the first procedure was to determine whether or not the Secretary might be properly restrained from delivering notices of election of members of the Senate and Assembly under the act.

The original jurisdiction of the court was thus invoked to restrain the Secretary and his successor in office from giving notices of election of members of the legislature, on the ground that the act of 1891 was unconstitutional. The Board of Supervisors of Adams county adopted their resolution on the eleventh day of November, 1891. On the seventh of the following January the District Attorney of that county caused notice to be given to the Attorney-General of the State that, in obedience to the resolutions of the supervisors, he desired to institute an action in the Supreme Court in the name of the Attorney-General.

Eight days later the petition of the District Attorney of Adams county was filed, setting forth specifically the wrongs of which the complaint was made. On the day following, the security for costs was furnished by Adams county; on the twenty-first, the Attorney-General notified the attorney for the petitioner that application has been made to the Supreme Court to begin an action for the purposes prayed for in its petition; and on the second of February the court granted leave to bring suit.

The Secretary of State was required by law[1] to make out

[1] Wisconsin *Laws*, 1883, Sec. 1, chap. 327.

a notice in writing, between the first day of July and the first of September in each year in which members of Assembly and State senators were to be elected for a full term, stating what senators were to be chosen at the next election, specifying the districts in which they were to be elected, publishing a copy of the notice in a newspaper printed in the capital once a week until the day of election, and also transmitting a copy to the clerk of each county in which an election was to be held.

To the complaint filed by the plaintiff answer was made by the respondent—the Secretary of State—that the complaint did not show that the District Attorney of Adams county had any interest in the subject matter which would entitle him to a standing in court to petition for a relief from a real or supposed grievance; nor had the court any jurisdiction in the case; nor did the complaint state wrongs recognizable in a court of equity; and finally, that the complaint failed to show that the act of 1891, either in letter or in spirit, was any violation of the Constitution of Wisconsin.

The question on which the action of the court turned was whether the subject matter of the complaint was one affecting the sovereignty of the State, its franchises, or its prerogatives.[1] The question at issue, therefore, involved the jurisdiction of the court and the unconstitutionality of the law. The jurisdiction of the court depended upon its powers under the Constitution of the State, which vested original jurisdiction in the court to issue writs of *habeas corpus*,

[1] State *Ex rel.* Drake *vs.* Doyle, Sec. State, 40 Wis. 186; Atty. Gen. *vs.* Eau Clair, 37 Wis. 442.

mandamus, *injunction*, *quo warranto*, *certiorari*, and other remedial and original writs. The constitutional provision that the court should have power to issue these writs and to hear and determine them conferred the fullest jurisdiction.[1] All judicial power in matters of law and equity are lodged in the courts.[2] The Constitution did not define any of the terms describing the above mentioned writs. The full meaning of its language had to be ascertained by an examination of the decisions of the court itself and of other courts.

There was slight doubt of the power of the court to issue a writ of *quo warranto*. It had been issued in an action where an information had been filed charging the defendants and others with exercising the powers of banking without authority of law.[3] So, too, the writ had been issued to determine what person had been elected Governor of the State.[4]

In cases in which State officers had been clothed with power under the Constitution to perform certain administrative acts, the original jurisdiction of the court had been exercised in issuing a writ of *certiorari*. So a State Superintendent of Instruction had been commanded to send up for review his proceedings in determining upon an appeal a question relating to the division of a school district;[5] and the writ had been issued to affirm his action in reversing, on

[1] Wis. Con., Art. 7, Sec. 3.

[2] Art. 7, Sec. 2.

[3] Atty-Gen. *vs.* Blossom, 1 Wis. 317.

[4] Bashford, relator, *vs.* Barstow, respondent, 4 Wis. 567; also cases quoted in Simmons' *New Wisconsin Digest*, 1, p. 716, Col. 2. part 2.

[5] State *Ex rel.* Morland *vs.* Whitford, 54 Wis. 150; 6 *Political Science Quarterly*, 493.

appeal, the determination of the district school board that a certain child was not a resident in a school district in the sense that he was entitled to the privilege of attending the public school in that district *gratis*.[1]

The ministerial action of State officers had been controlled through the exercise of the original jurisdiction of the court by means of a writ of *mandamus*, as when a Secretary of State had been compelled to revoke the license of a foreign insurance company,[2] and when a writ was invoked on behalf of the State as a purely prerogative right in matters *publici juris* it was held that the court had no discretion and that the writ goes *ex debito justitiæ*.[3] By this writ a Secretary of State had been compelled to audit a claim, and it was held that the court had a right to direct him as to the question of interest allowed.[4]

Through this writ the court could require the Board of State Canvassers to determine, in accordance with law, which one of the candidates for the office of representative in Congress was entitled to a certificate of election.[5] So by writ of *mandamus* the Secretary of State, State Treasurer, and Attorney-General, *ex officio* land commissioners, had been compelled to issue patents for State lands to certain petitioners.[6]

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[1] State *Ex rel.* School Dis. *vs.* Thayer, Supt., 74 Wis. 150.

[2] State *Ex. rel.* Drake *vs.* Doyle, Sec. State, 40 Wis, 175.

[3] State *Ex rel.* Continental Ins. Co. *vs.* Doyle, Sec. State, 40 Wis. 220, 236.

[4] State *Ex rel.* Sloan *et al. vs.* Warner, Sec. of State, 55 Wis. 271.

[5] State *Ex. rel.* McDill *vs.* Board of State Canvassers, 36 Wis. 498.

[6] State *Ex rel.* Com. Pub. Lands, 60 Wis. 344; 70 Wis. 627; 73 Wis. 211.

From these decisions it was claimed that a State officer was not clothed with discretion in the performance of official duty; that his action would be reviewed by the court, which would compel him to perform his duty according to law; and that in all cases the court would interpret the law and the Constitution and compel action accordingly.

In all matters *publici juris* affecting the sovereignty of the State, its franchises, or prerogatives, or the liberties of the people, the writ of injunction issues as a matter of strict right and duty, and the court had no more discretion to withhold it to restrain violation of public right than to withhold *mandamus* to enforce public duty.[1] The phrase "liberties of the people" in judicial sense signifies the aggregate political rights and franchises of the people of a State at large.[2]

It was claimed that the cases involving the apportionment of the State under the act of 1891 affected the liberties of the people; that the provisions of the law, if carried out by the Secretary of State, would violate the Constitution and deprive a large portion of the inhabitants, that is, electors of the State, of an equal and just proportion of political power and right in the choice of representatives in the legislature; in which case the legislative body would restrain the liberty of every citizen of the State. With equal right it might change the laws relating to inheritance and the jurisdiction of property. It might raise or lower the rates of taxation; or largely increase the number of officials in the State and

[1] Atty-Gen. *vs.* Railways, 35 Wis. 425 and 595; State *Ex. rel.* Atty-Gen. *vs.* Eau Clair, 37 Wis. 400.

[2] *In re* Pierce, 44 Wis. 441.

the expense of maintaining them; or determine the fees of all officials who enforced the mandates of the court.

From this review of these cases it was maintained that there could be no controversy over the original jurisdiction of the court to control the action of the Secretary of State in the discharge of his duties, which, as in giving notice of election, were purely ministerial and involved no element of discretion.[1] There was no doubt that, were the act of 1891 a constitutional provision, and were the Secretary of State inclined for any reason to disregard it, and were he to refuse to call the coming election under the law, the court would send its mandate to him to compel him to obey the law. If it appeared that the law which he proposed to obey was clearly in violation of the Constitution, the court was under a solemn duty to act with equal promptness in restraining him from doing a great public wrong.

Chief-Justice Ryan had distinguished between the action on a writ of injunction and that of *mandamus*. *Mandamus* commands; injunction forbids. *Mandamus* compels duty; injunction restrains wrong; and there is sometimes a doubt which is the proper writ to issue. It was safe to assume that the Constitution gives injunction to restrain excess in the same class of cases in which it gives *mandamus* to supply defect.[2]

Nor were there wanting cases from the supreme courts of other Commonwealths which illustrated the doctrine. The Auditor of the State of Ohio had been enjoined for the pur-

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[1] Martin, relator, *vs* Doyle, Sec. State, 38 Wis. 92; State *Ex rel. vs* School Dis., 65 Wis. 631.

[2] Railway Cases, 35 Wis. 520.

pose of protecting a United States bank in that State in the exercise of its franchises, which were threatened in 1824 by an act of the State legislature in violation of the Constitution of the United States.[1]

So the Governor and other State officers acting as a Board of Liquidation had been restrained from carrying out the provisions of a State law in liquidating an indebtedness claimed to be due from the State, on the ground that such action would impair securities already issued and thus violate the obligation of the contract.[2]

In general the United States courts clearly established the doctrine that in the exercise of equitable jurisdiction the officers of a State could be enjoined from proceeding to act under a State law which violates the Constitution of the United States and invades the rights of citizens of other States.

This feature of government, the power of courts to declare a law or a statute unconstitutional, is peculiar to the American political system and may be called a discovery in civil government. A fundamental difference between the governmental system of Great Britain and that of the United States is illustrated in the place and function of the judiciary in the American system, to which the British system has no corresponding part. The law in the United States is fundamentally set forth in a written Constitution "established and ordained by the people of the United States."

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[1]Osborn *vs* U. S. Bank, 9 Wheaton 739; affirmed in Davis *vs* Gray, 16 Wallace, 803.

[2]Board of Liquidation *vs*. Maocmb, 92 U. S. 531; Mecham Pub. Off. Sect. 997.

The Constitution of the United States and the laws and treaties made under it are the supreme law of the land. Because of this supremacy of the Constitution the several federal States as civil corporations maintain their existence by express grants. The executive, legislative, and judicial powers of the United States and of the several States are subordinated to this Constitution and are controlled by it. Neither the President of the United States, nor Congress, nor the Governor of a State, nor its legislature, nor its courts can legally exercise power inconsistent with the provisions of the federal Constitution. Every State legislature, therefore, becomes a subordinate law-making body, its laws being of the nature "of by-laws, valid whilst within the authority conferred upon it by the Constitution, but invalid or unconstitutional if they go beyond the limits of such authority."[1] All the power of the English state is concentrated in the imperial Parliament, and all departments of government are legally subject to absolute parliamentary control. The British judiciary does not rank with the British Parliament as a coördinate branch of government, and it might be modified, or even abolished, by act of Parliament without violation of the British principles of constitutional government.

In America, on the contrary, the federal judiciary is coordinate with the President and with Congress, and the State judiciary with the Governor and the legislature. The coördination of the powers of the judiciary and the executive and legislature is usually set forth in a State Constitution, just as the coördination in analogous federal mat-

[1] Dicey, *The Law of the Constitution*, Lecture IV.

ters is set forth in the Constitution of the United States. By means of the written Constitutions of the State, and of the United States the duties and powers of a judge, whether federal or State, are clear. The State is, therefore, bound to consider as void every act of the legislature inconsistent with the State Constitution or with the Constitution of the United States.

A State judge has before him two Constitutions, that of the State and that of the United States. By them the process of government, both in the Commonwealth and in the United States, is made practically certain and clear, and one of the chief objects of government is secured. This organization of government in the State does not merely produce a system of checks and balances in which the co¨rdinate departments of the Commonwealth or of the United States are, as it were, pitted against each other for the purpose of conserving the interest of the State, though often conceived as the intended expression of such checks and balances. The existence and coördination of the three departments of government are rather to be conceived as functional, and as the three-fold aspect of the civil unit. The unit is representative and consists of powers delegated by the sovereign power in the State. The entire civil provision is, therefore, a device whereby to conserve the interests of the civil organism; to identify them; and to free from uncertainty all civil procedure in which they are involved.

In a representative government like our own, any confusion in the terms by which its powers are delegated must cause civil discord and prevent the people from enjoying all the harmonious results which daily give a definition not

only of popular rights and liberties, but also of the normal progress of the State in its industrial affairs.

The judicial system in American government is illustrative of one of the most remarkable evolutions in the modern state; and the applications of its functions in determining the harmonious development of civil institutions in America constitute, perhaps, the primary evidence of the claim of representative government to a future of wide extension in the world.

The question whether the apportionment of representation in Wisconsin in 1891 was constitutional raised far more than a point of technical procedure in a court of law. An act of apportionment affects all the political interests of a State and its citizens, and is of such fundamental importance as to conserve and correlate or to imperil them. The interpretation of the validity of that act must necessarily test the nature of American representative government. In the course of that interpretation not only appears the power of the legislature to make such an apportionment as interpreted by the co¨rdinate branch of the government, the supreme court, but there also appear the principles of government upon which such an apportionment must be made; the application of these principles by the legislature in a legislative act; the interpretation of that act by a coördinate branch of that government; the duties of ministerial officers in the State in the execution of the terms of that act; or, fundamentally, and in brief, the relations which exist between the three representative agencies in the State, the executive, the legislative, and the judiciary.

An act apportioning representation thus becomes a test of

the quality of representative government in a free commonwealth; and in its comprehensiveness, in its political effect, in the relations in which it places one elector to another, and groups of electors to other groups, in its effect in equalizing the representation of the citizens of the State, it is a process which exemplifies the character of the administration of public affairs. Tested by the principles of representative government, an act apportioning representation is the evidence of a sound or of an unsound condition of the State. The judicial department, therefore, becomes the one tribunal through which the unlawful assumption of power by the legislative body can be prevented and by which the action of all legislative bodies can be restrained according to the provisions of a written Constitution.

The relation between courts of justice and the legislative authority is clearly laid down in the *Federalist.* "There is no position," says Hamilton, "which depends on clearer principles than that every act of a delegated authority, contrary to the tendency of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal, that the servant is above his master, that the representatives of the people are superior to the people themselves, that men acting by virtue of powers delegated may do not only what their powers do not authorize but what they forbid. If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the

natural presumption where it is not to be collected from any of the provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will for that of their constituents. It is far more rational to suppose that the courts were designed to be the intermediate body between the people and the legislature, designed, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. The Constitution is in fact and must be regarded by the judges as the fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from a legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution should be preferred to the statute; the intention of the people to the intention of their agents. Nor does this conclusion by any means suppose the superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."[1]

[1] The *Federalist*, LXXVIII.

In the Massachusetts Convention of 1820, Webster, in discussing the independence of the judiciary, further illustrated the fundamental ideas thus set forth by Hamilton in the *Federalist.* "It can not be denied," said Webster, "that one great object of written constitutions is to keep the departments of government as distinct as possible and for this purpose to impose restraints designed to have that effect, and it is equally true that there is no department in which it is more necessary to impose restraints than the legislative. The tendency of things is almost always to augment the power of that department in its relation to the judiciary. It is the theory and plan of the Constitution to restrain the legislature, as well as other departments, and to subject their acts to judicial decision whenever it appears that such acts infringe constitutional limits. The Constitution is the supreme law. Any act of the legislature, therefore, inconsistent with the supreme law, must yield to it; and any judge seeing this inconsistency, and yet giving effect to the law, would violate both his duty and his oath."[1]

In illustration of the same principle, Chief-Justice Marshall declared that the object of a written Constitution is not only to define and limit the powers of the legislature, but also to prevent those limits from being mistaken or forgotten.[2]

No principle in American law is better established than that of the independence of the judiciary and its right and duty to decide the constitutionality of a law. The application of this principle in the case affecting the constitution-

[1] Webster's *Works*, III, 29, 30, 31.

[2] Marbury *vs.* Madison, 1 Cranch 137.

ality of the Wisconsin apportionment act of 1891 illustrated the right and power of the supreme court of a State to enjoin the Secretary of State from making and publishing notices for an election under such an act. The question of jurisdiction was, therefore, settled. But was the act itself unconstitutional?

In order to determine whether or not the act was unconstitutional, it became necessary to examine the provision of the State Constitution concerning apportionment, and in such an examination the debates in the convention which framed that Constitution are primary evidence. The article in the Wisconsin Constitution[1] on the apportionment of representation differed somewhat from the propositions on the subject originally introduced in the convention. It was first proposed that the members of Assembly should be chosen by single districts, annually, on the day of the general election, by the qualified electors of the districts, and that Senators should be chosen for two years at the same time and in the same manner as members of Assembly. Senators were to be chosen in each senatorial district and, at the first session of the legislature, were to be divided by lot into two equal classes; the seats of the first class to be vacated at the expiration of the first year, and of the second class at the expiration of the second year, so that one-half of the Senate should be chosen annually.[2]

This provision created what is known as the double district system—two senators in each district—and illustrates

[1] Wisconsin Const., Art. IV, Sec's. 3, 4, 5.

[2] *Journal of the Wisconsin State Constitutional Convention*, Madison, W.T. Tenney, Smith and Holt, Printers, 1848, p. 117.

the persistency of the ideas held by the framers of Constitutions in the northern States, that local representation should always be preserved. No restrictions were placed upon the legislature in making either assembly or senatorial districts. In the discussion of this apportionment, an amendment requiring that districts containing the requisite population should be as compact as possible was adopted without dissent.[1] Whether the members of Assembly should be elected from single districts within a county, or on a general county ticket, was finally determined by providing for single districts.

In order to prevent gerrymandering, it was decided that the convention itself should make the first apportionment and not leave it either to the legislature or to the county boards. The senatorial districts were to be of convenient and compact territory,[2] and no assembly district was to be divided in the formation of a senatorial district.

In 1881 the Constitution of Wisconsin was amended and the sessions of the legislature were changed from annual to biennial. The amendment provided that members of Assembly should be chosen biennially by single districts; that these districts should be bounded by county, town, ward, or precinct lines, should consist of continguous territory, and be in as compact form as practicable. Senators were to be elected by single districts of convenient, contiguous territory, and, as before, no assembly district was to be divided in the formation of a senatorial district.

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[1] *Id.* p. 255.

[2] "Contiguous territory" is the wording of the clause.

Therefore, in order to prove the unconstitutionality of the act of 1891 it was necessary to show that its apportionment did not comply with the provisions of the Constitution. The excess over the unit of representation in certain districts, and the deficiency in other districts, were exhibited to prove the plain deviation. It was shown also that in the formation of the districts the constitutional provision for compact territory had been violated.[1]

The intention of the framers of a State Constitution is best known from the debates in the convention which framed it. The debates in the Wisconsin convention of 1848 show that the system of apportionment, finally incorporated in the Constitution, was to preserve county lines, which would follow the adoption of the single district system. The fundamental idea in representation in America, that each county is a corporate community constituting a representative unit having communal interests, has been illustrated repeatedly in the formation of all the State Constitutions, and was at the basis of the theory of representation in Wisconsin. The county should be viewed in the light of a family. It was necessary that individual rights should be defined and that no difficulty be left for the head of the family to settle[2]—an idea patriarchal in antiquity, and early illustrated in the civil organization of New England as well

[1] The excess or the deficiency in population in the districts, with maps showing the union of counties or towns under the Act of 1891, with much historical and explanatory matter, are given in an exhaustive pamphlet on *The Gerrymander of Wisconsin, A Review of the Legislative Apportionment Act of 1891*, by A. J. Turner, of Portage, Wisconsin.

[2] *Debates*, Wisconsin Convention, 1848.

as of the middle and southern Colonies. Each organized county was conceived as having separate interests; as being a small republic that could not be properly represented except by its resident citizens.[1] It may be considered as settled in American government that the county, organized as a corporation, is the fundamental unit of representation, and that a county can be represented only by its own citizens who reside within its boundaries and who are identified with its commercial interests.

Although Webster, in the Massachusetts convention of 1820, denied the legal and political claims which were put forward by Judge Levi Lincoln and others in defence of corporate representation, it must be admitted that the course of the evolution of representative government in this country has brought out clearly and indisputably the legal and political claims of the county to this fundamental place as a political corporation. There was a particular application of this idea in the making of the Wisconsin Constitution of 1848, expressed in the language of a member of the convention, "that population should not be the basis of representation," "that territory should be the basis in particular, but population in the main,"[2] implying that one county, though small, should be entitled to representation as well as another though large, but that the unit of representation should be a number of people within an organized territory, that is, within a county. Therefore, as the county lines always partially coincided with the town and ward lines, the meaning of the word county in the Constitution would be

[1] *Id.* p. 385.

[2] *Debates*, p. 390.

wholly lost if, in the apportionment of representation, these lines were disregarded. This interpretation conforms to that principle of constitutional law laid down by Justice Cooley, that effect is to be given if possible to the whole instrument, and to every section and clause, and in favor of a construction which will render every word operative.[1]

What power authorizes an apportionment of representation to be made? Does it reside in the legislature, or is the legislature to be an agent in exercising that power? A power affecting so fundamentally the interests of the people of the State must be defined in a written Constitution, in order to avoid the civil confusion which its abuse would produce. An apportionment of representation by the legislature, therefore, involves the powers of the legislature, and the relative authority of a legislative act and of the Constitution itself. Such an apportionment must have for its original authority the will of the sovereign power in the State, which, in the American political system, resides in the people and not in any branch or department of government.[2] The Constitution, therefore, limits the power of the legislature. It does not merely direct what the legislature shall do, but forbids the legislature to do certain things.[3] In construing a Constitution, the same rules in the interpretation of language are applicable as in construing the acts of a legislature.[4]

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[1] Cooley, *Constitutional Limitations*, 5th ed., pp. 70–71.

[2] Bashford *vs.* Barstow, 4 Wis. 567.

[3] State *Ex rel.* Brayton *vs.* Merriman, 6 Wis. 14; Varney *vs.* Justice, 86 Ky., 569.

[4] 1 S. & B. Am. Stat. p. 35.

The Constitution and a law passed by a legislature are not of the same rank; when they conflict, the law must give way to the Constitution. It is the function of the courts to determine whether such conflict exists.[1]

The rapid strengthening of the national government has attracted to it the attention of statesmen and of writers on government and jurisprudence, but little attention has been given to the development of government in the Commonwealths; yet without a knowledge of this development it is impossible to understand the origin, nature, and evolution of American democracy. Of the principal aids in our understanding of the government of the Commonwealths there exists the work of the constitutional conventions, much of which exists in print; the acts, public and private, of State legislatures, nearly all of which are printed; the ordinances of cities, and the reports of judicial decisions in the superior courts of record in all the States. In the determination of constitutional questions the proceedings in constitutional conventions are primary evidence, and it may be laid down as fundamental in American government that in the interpretation of a State Constitution the meaning of words as construed by the people at the time of its adoption and the remarks made by the members of the convention which framed the fundamental law are strong primary evidence.[2]

The principle has been touched on by Justice Cooley, that every Constitution has a history of its own which is likely

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[1] Cooley, *Constitutional Limitations*, 5th ed., p. 55.

[2] Railway Co. *vs.* Taylor Co., 52 Wisconsin 37, 63, 64. Cooley, *Constitutional Limitations*, p. 81. Bay City *vs.* State Treasurer, 23 Mich. 506.

to be more or less peculiar, and unless interpreted in the light of its history is liable to be construed to express purposes which were never in the minds of the people when agreeing to it. In the interpretation of a Constitution, therefore, a court of law keeps in mind this history and the times and circumstances under which the Constitution was formed, in order to "enforce the law which the people have made and not some other law which the words of the Constitution may possibly be made to express."[1]

It follows that when a Constitution prescribes the manner of making an apportionment of representation, it is, in effect, a prohibition of any manner save that prescribed.[2] An act of a legislature evading or invalidating the purpose of the Constitution, whether expressed or implied, is, therefore, void.[3] A provision of the Constitution which declares the manner in which an apportionment should be made must be construed according to the ordinary meaning of words as understood at the time when the Constitution was made, and if by clear expression, or by implication, the legislature be excluded from pursuing any course, such limitation is as valid as if the legislature were prohibited from that course by a special provision of the Constitution. The effect is the same as if the legislative act were repugnant to such a special provision.[4] A constitutional provision is not merely directory, to be obeyed at the discretion of any of the departments of the government;[5] such a provision is mandatory.

[1] People *vs* Harding, 53 Mich. 485.

[2] State *Ex rel.* Murphy *vs.* Barnes, 24 Florida 29.

[3] People *vs.* Albertson, 55 N. Y. 50.

[4] Page *vs.* Allen, Penn. State 338; S. C., 98 Am. Dec. 272.

[5] Hunt *vs.* The State, Texas and S. W. III. 233.

The legislature in making an apportionment must not deviate from the mandate of the Constitution; nor can it be conceived to have any discretion in the exercise of its powers in making an apportionment. It must proceed according to the plain interpretation of the language of the Constitution itself. It might be said that when a legislature lays off a State into congressional districts it exercises a political, discretionary power, for which it is responsible to the people. It may be asked what is the distinction between the political and the legislative power? The Constitution might have vested the power to make an apportionment of representation in the Governor, in the courts of law, or in a commission specially organized for the purpose.

In 1870 the people of Louisiana empowered the Governor and Secretary of State to "ascertain and fix the apportionment of the State for members of the first house of representatives." In Ohio, by the Constitution of 1850, the power for making such apportionment was vested in a board of State officers. In either case the power to district a State would be restricted by the Constitution itself. Legislative power extends only to the making of laws, and in its exercise it is limited and restricted by the paramount authority of the Federal Constitution and of State Constitutions. Political rights do not differ, as subjects of legislation, from any other rights of a free people. An apportionment of representation affects the interests of political parties, but such interests are in no instance cognizable under a State Constitution. In the administration of the affairs of a Commonwealth, its counties and towns are political subdivisions and are factors to be considered by the legislature in its acts.

The legislature which violates a restriction of the Constitution relating to these counties and towns, or one relating to their powers of local self-government, by depriving them of the right of self-government and the equality of representation, transcends its powers.

It is not enough that an apportionment of representation merely redistricts the State. The power of the legislature is not absolute in such an apportionment and the courts must determine its constitutionality. An apportionment act must be strictly construed; because the State Constitution expressly indicates the direction in which the legislature shall go in making such an apportionment. There are powers of the legislature under the Constitution which are not so restricted; but an examination of all the State Constitutions, from the earliest to the latest, discloses the gradual and closer definition of the process by which an apportionment of representation shall be made. Directly after the Revolution this definition of process began and it has continued until the present time with ever increasing precision, and consequently with limitation of the power of the legislature to apportion representation.

The whole weight of representative government falls upon the equality of representation. Any variation from a basis of equality will disturb the civil poise. This process of defining the duties and powers of a State legislature in apportioning representation is from uncertainty at the close of the eighteenth century to certainty at the close of the nineteenth, and the language of the Commonwealth Constitutions themselves demonstrates that it was the intention of the framers that the power of apportionment should be

strictly construed. A certain definition of the powers of each branch of the government; a certain definition of the rights which the people have delegated to their representatives; a certain definition of what rights they have retained unto themselves;—these can be made by a written Constitution. The limitation on the power of State legislatures, which has developed so rapidly in the later State Constitutions in the numerous inhibitions on special legislation, are of a similar nature although not of a similar rank with the limitation upon the legislature in making an apportionment of representation.

Early in our national history, Mr. Justice Paterson, of the Supreme Court of the United States, defined the relation of legislatures to the Constitution: they are the creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution. It is their commission, and, therefore, all their acts must be comformable to it or else they will be void. The Constitution is the work, the will, of the people themselves in their original sovereign, unlimited capacity; law is the work, the will, of the legislature in their derivative, subordinate capacity. The one is the work of the creator, the other of the creature.[1]

If an act of the legislature districting a State is declared unconstitutional, it does not follow that the court would thereby make an apportionment act and substitute its judgment for that of the legislature. Such an assumption confuses two departments of government. The court in declaring a law unconstitutional does not thereby make a new law. It is the function of a court of justice to declare the law.

[1] Van Horn *vs.* Dorrance, 2 Dallas 308.

It is the function of a court to determine whether the constitutional provision for an apportionment of representation has been obeyed by a legislative act brought before it for adjudication by due process of law.

It was contended by the learned counsel who represented the State against the Secretary of State in the case involving the Wisconsin apportionment of 1891, that the act violated the provisions of the Constitution, and that the court had jurisdiction to determine not only the constitutionality of the act, but also to issue an injunction prohibiting the Secretary from issuing notices of election under the act.

The decision of the court was long and able. It affirmed its own jurisdiction in the case, which meant that the question involved was one *publici juris*, presenting a case in which the interposition of the court was required to preserve the State's prerogative of legislation, because the Senate and Assembly elected under an unconstitutional apportionment act would not be bodies which could lawfully exercise the prerogatives of legislation. The court had original jurisdiction because the apportionment act, if unconstitutional, would deprive the people of equal representation in the legislature, a right guaranteed them by the Constitution.

Nor was the jurisdiction of the court an invasion of the constitutional provisions of the legislative department, but an inquiry into the constitutionality of the law. The case concerned matters strictly *publici juris* in which no one citizen had any special interest other than those common to all citizens. The case was, therefore, properly brought by the Attorney-General in the name of the State on a complaint

made to him by a private citizen;[1] nor was it necessary that the private citizen should be joined with the Attorney-General in the complaint, nor that it be shown that either he or that citizen had any special interest in the case.

An act of the legislature apportioning the State into senate and assembly districts is passed in the exercise of its legislative and not of its political power, and, therefore, the constitutionality of such an act is the subject of judicial inquiry. The Secretary of State is a ministerial officer, and his duty in respect to the notices of the election of members of the Senate and of the Assembly under an apportionment act are ministerial, not political; if such an act is unconstitutional, he may be restrained by injunction from proceeding under it.

The provisions of the Constitution requiring the legislature to apportion the State are mandatory and not subject to legislative discretion. And when the Constitution declares that assembly and senatorial districts shall be bounded by county, precinct, town, or ward lines, and shall consist of contiguous territory in as compact form as practicable, the integrity of county lines must be preserved and the formation of a district partly out of one, or of more than one county, or of a fraction of another county, or of fractions of several counties, can not be made, and such a law violating the Constitution will be void.

Such a law further violated the Constitution in its apportionment of population, for the Constitution required the apportionment of the State to be according to the number of inhabitants. As the number of senators and of members

[1] A. J. Turner, Esq., of Portage, Wisconsin.

of Assembly are determined by the Constitution, the unit of representation could, therefore, be known upon the basis of the federal census. An apportionment by which the most populous senate district contained sixty-eight thousand and the least populous thirty-seven thousand, and by which the most populous assembly district contained thirty-eight thousand and the least populous six thousand, was not an apportionment according to the meaning of the Constitution. The several provisions of the act apportioning the State were largely dependent on each other; therefore, if some of the districts were apportioned unconstitutionally the entire act would be void.[1]

The court in this celebrated case not only entered into an examination of its own jurisdiction, but also with equal learning set forth several principles of representative government in America. The question before the court affected the integrity and stability of the political system. An apportionment act affects no one class of people, no one locality, but all the people of a State in their collective and individual rights and interests. Such an act can not be declared void because it was supposed to violate the natural, social, or political rights of the people, unless it was made clear that the act was violative of rights guaranteed or protected by the Constitution. It would not be sufficient to show that the act violated principles of government unless these principles were placed beyond legislative encroachment by the Constitution itself. Nor was it sufficient that

[1] State *Ex rel.* Atty-Gen. *vs.* Cunningham, Sec. of State, Circuit Court of Wisconsin, March 22, 1892. Northwestern Reporter, Vol. 51, 725.

the act in a general sense was opposed to the spirit of the Constitution. The unconstitutionality of such an act consisted in its repugnance to the expressed provision of the Constitution and to those limitations necessarily or conclusively implied from it; for in all matters of unlimited discretion, or in matters involving only considerations of public policy, the determination of the legislature must be final and conclusive. The courts could not change it.

Nor could the act be held void because of any supposed improper motives or unconstitutional intentions of the legislative body which had passed it. Reasons of public policy forbade a judicial inquiry made with a view of defeating the operation of any public legislative enactment. The motives of the legislature are not the subject of judicial inquiry. Such an inquiry can only be made into the powers of the legislature under the Constitution. The ancient doctrine that the king can do no wrong applies to the motives of the legislative body, for it is never supposed that the legislature has acted improperly, unadvisedly, or from other than pure, public motives under any circumstances, when acting within the constitutional limits of its authority.

The rights to be guarded by an apportionment act are of such a character that provisions regarding them in the Constitution are to be construed as mandatory and not as directory merely. The language of a Constitution, therefore, was a proper subject for interpretation, under the general principle that effect is to be given to every clause or word of a statute, and that no word was to be treated as unmeaning if a construction could be legitimately found which would preserve it and make it effectual—a rule applicable with special

force to written Constitutions, in which the people are presumed to have expressed themselves in careful and measured terms corresponding in importance to the powers delegated, leaving as little as possible to implication.[1]

The entire constitutional history of Wisconsin showed that it was the intention of the makers of the Constitution of 1848 to avoid opening the door to gerrymandering. In consideration of all the facts and circumstances, and having due regard to the language of the Constitution, the court was compelled to the conclusion that the Constitution was not intended to permit the legislature to dismember any county in the formation of districts, but that the legislature was prohibited from placing one county, or more than one, and a portion of a county, or portions of two or more counties, in the same assembly district, and that such prohibitions were found in the constitutional provision which required that assembly districts should be bounded by county, town, or ward lines.

The principle of apportionment according to population was violated in the act of 1891. "The county is the primary territorial unit in the formation of assembly districts, and members of Assembly must first be apportioned to counties." There must, therefore, be substantial equality of representation in proportion to population as between all the different counties, and between districts composed of two or more counties.[2] As the assembly districts were the unit of civil measure, the senatorial districts could not be formed until the assembly districts had been properly ap-

[1] Cooley, *Constitutional Limitations*, p. 72.

[2] N. W. Reporter, Vol. 51, p. 744.

portioned. The act of 1891 was, therefore, unconstitutional and void.

Because of this adjudication the Governor of the State, on the first day of June, 1892, issued a proclamation convening the legislature in special session on the twenty-eighth day of the month, to apportion the State into senatorial and assembly districts.

The legislature assembled and apportioned representation in the State, but its act was as much in violation of the Constitution as the act which the court shortly before had declared unconstitutional and void, and this second apportionment act became the subject of judicial examination in the Supreme Court on the ground that, like the preceding act, it was unconstitutional. The apportionment of 1892 varied but little in its method from that of 1891. Although it apportioned the State according to the divisions of county, town, and ward lines, like the preceding act, it grouped the population unequally, so that the variation from the unit of representation was a deficiency of more than twenty thousand of the population in the fourth senatorial district and an excess, in the seventeenth district, of nearly fifteen thousand. Similar variations from the representative unit were made in the assembly districts.

Meantime a similar case of the violation of representation had arisen in Michigan,[1] and the Supreme Court of that State declared that the time had arrived for plain speech against the outrageous practice of gerrymandering which had become so common in the country. It had been too long suffered without rebuke and it threatened not only the

[1] Giddings *vs.* Blackner, 52 N. W. Rep. 544.

peace of the people but the permanency of free institutions. The rights of the people could be saved by Congress alone, who could give them a fair count and equality of representation. Every intelligent school boy knew the motives of these legislative apportionments. "It is idle for the courts to excuse the act on other grounds, or to keep silent on the real reason, which is nothing more or less than partisan advantage taken in defiance of the Constitution and in utter disregard of the rights of the citizen."

The principle of apportionment was well illustrated by Webster, in 1832, in his report to the Senate on the apportionment of representation in the United States. "A Constitution must be understood not as requiring an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of representation among the several States according to their respective numbers as near as may be. That which cannot be done perfectly must be done as near perfection as possible. If exactness from the nature of things cannot be obtained, then the greatest possible approach to exactness should be made.[1] Congress is not absolved from all rule merely because the rule of perfect justice cannot be applied. In such cases the approximation becomes the rule, it takes the place of that very rule which would be preferable, but which is found to be inapplicable, and because it is an obligation of binding force; the nearest approximation to exact truth or exact right, when either cannot be reached, prevails in every case, not as a matter of discretion but as an intelligible and definite rule, dictated by justice and conforming

[1] Webster's *Works*, III. p. 375.

to the common sense of mankind; a rule of binding force in each case to which it is applicable, and no more to be departed from than any other rule or obligation.[1] So it may be laid down as settled in State government that representation shall be apportioned to population as near as may be.[2]

It may also be laid down as a fundamental principle of American government that in apportioning representation the discretion of the legislature is limited by the mandates of the Constitution which are to be carried out as nearly as possible. The purpose of the written Constitution is to eliminate from legislation the element of mere arbitrary discretion. Otherwise the legislature will trample upon the Constitution, and the statute will take the place of the fundamental law of the Commonwealth. Equality of representation is a principle in American government; therefore it was never contemplated in a Constitution that one elector should possess more influence than another in the person of a representative or a senator. Each elector in the Commonwealth is possessed under the Constitution of equal power and influence, and such equality lies at the basis of free government. The right to equal suffrage is a high right exercised by a citizen in a free country, and equal representation is the expression of that right in the making and in the administration of the laws of the land. A written Constitution fixes the right of the elector beyond dispute. It reduces his rights and privileges to a certainty, of which a court of justice can take cognizance. The legislature cannot deprive him of his right to such equal representation.[3]

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[1] Story, *Commentaries*, II, 682, note, and Kent *Commentaries*, I, 231.

[2] People *vs.* Cannaday, 73, N. C. 198.

[3] Vol. 52, N. W. Reporter, 946.

It was argued, in defense of the second gerrymander in Wisconsin, that an equal apportionment of property was a sufficient equivalent for a variation in population in two districts—a doctrine which was a revival and a perversion of the doctrine of property as a basis of government advocated by Webster seventy years before. In this second decision, handed down by the Supreme Court of Wisconsin, on the seventh of October, 1892, the opinions in the previous case were re-affirmed, with the additional opinion that when a district with less population than another was given the same representation because of the greater value of the property in it and on account of the nature and character of its population and of its business interests, a constitutional apportionment of representation had not been made. Not only should such a district be bounded by county, town, precinct, or ward lines, and consist as far as practicable of contiguous territory in compact form, but the legislature in its apportionment should also make the districts as nearly as may be according to the number of inhabitants; an unequal districting was beyond the discretionary power of the legislature.[1]

The evil running through these unconstitutional acts was their assumption that the only limit to the discretionary power of the legislature, in making such apportionment, was the major and minor fractions of the unit of representation; in asserting a broad discretionary power in the formation of assembly districts by giving to the inhabitants of one assembly district three times the representative power pos-

[1] State *Ex rel.* Lamb *vs.* Cunningham, Sec. of State, N. W. Reporter, Vol. 53, p. 35.

sessed by another; and in the formation of senatorial districts by giving to the inhabitants of one of them more than twice the representative power possessed by the inhabitants of another. For such obnoxious standards the Constitution gave no warrant and would not bear such a construction.

The first Wisconsin case was the first in this country in which an entire apportionment act was passed upon by a court. The attorneys representing the interests of the Commonwealth were in great doubt whether the court would take jurisdiction of the case, but the court placed no obstacle in the way and the matter of jurisdiction proved to be a simple one. The case is also important as sustaining the right of a private citizen to bring an action *publici juris* without the consent of the Attorney-General.

The great significance of the judicial decisions in these cases implies that the power which a legislative body is compelled to exercise by the Constitution cannot be considered as discretionary. The constitutional rights of the citizen to equal representation and a just apportionment of representation in the Commonwealth are mandatory upon its legislature.

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Note: The Wisconsin gerrymander of 1891 is the subject of a valuable pamphlet by A. J. Turner, of Portage, Wisconsin. Mr. Turner inaugurated the test case in the Supreme Court of the State. In 1893 Mr. Turner generously placed in my hands a copy of his pamphlet together with copies of the briefs filed by both sides in the Wisconsin gerrymander cases. Of counsel, in this case, among others, were Hon. William F. Vilas, in support of the constitutionality of the act of 1891, and Hon. John C. Spooner, against its constitutionality.

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